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DEPARTMENT OF JUSTICE  
PORTLAND OFFICE

April 6, 1998

Ken Bierly, Program Manager  
Governor's Watershed Enhancement Board  
Third Floor  
255 Capitol Street NE  
Salem, Oregon 97310-0203

Re: Watershed Councils and the Public Meetings Law  
DOJ File No. 690-400-NR011-94

Dear Ken:

You asked whether watershed councils were subject to the Oregon Public Meetings Law. As noted below, the answer will depend upon the circumstances of a particular watershed council. But as a general matter, it is unlikely that a watershed council would be covered by that Law.

The Public Meetings Law applies only to meetings of the "governing body of a public body." ORS 192.630(1). A "public body" is any state or local government board, commission, council, bureau, committee, subcommittee or advisory group thereof created by or pursuant to the state constitution, a statute, administrative rule, order, intergovernmental agreement, bylaw or other official act. ORS 192.610(4). If an entity is subject to the Public Meetings Law, then as a general rule the meetings of its governing body must be open to the public.

Watershed councils are part of a new generation of public-private partnerships that do not fit easily into traditional legal definitions. Nothing in state law specifies how watershed councils are to be formed. ORS 541.350(7) merely describes a watershed council as a "voluntary local organization designated by a local government group convened by a county governing body ... ." This extremely general definition allows for many possible scenarios under which a watershed council may be "designated" by a local government group. You have informed me that current watershed councils vary in composition, although most include representatives of both the public (state, local and federal) and private sectors. Because it is not unusual for state and local officials to serve on the governing bodies of private organizations, the presence of state and local officials on a watershed council does not by itself subject the council to the Public Meetings Law.

Moreover, a private body does not become subject to the Public Meetings Law merely because it receives public funds, contracts with governmental bodies or performs public services. In the context of the Oregon Public *Records* Law, which also applies only to "public bodies," the Oregon Supreme Court has developed six factors for determining whether a private entity is the "functional equivalent" of a public body for the purpose of that law. *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994). A court probably would use those factors to determine whether a private body is covered by the Public Meetings Law. No one factor drives the conclusion; rather, they are to be analyzed together. A quick look at those factors suggests that it is unlikely that a watershed council would be considered the functional equivalent of a public body:

- (1) The entity's origin: Was it created by government or was it created independently? As noted above, Oregon law says little about the creation of watershed councils, other than to say that they are "voluntary local organization[s] designated by a local government group convened by a county governing body ... ." ORS 541.350(7). This does not necessarily mean that such a council must be "created" by government; rather, it could include situations in which government acknowledged a council created outside the auspices of government.
- (2) The nature of the functions assigned and performed by the entity — are the functions traditionally performed by government or are they commonly performed by a private entity? Chapter 541 does not really "assign" duties to watershed councils. Instead, it describes watershed councils as entities that "address the goal of sustaining natural resource and watershed protection and enhancement within a watershed" (ORS 541.350(7)) and authorizes GWEB to "grant funds for the support of watershed councils in assessing watershed conditions, developing action plans, implementing projects and monitoring results and for the implementation of watershed enhancement ... ." (ORS 541.370(1)(e).) Obviously, these are very general descriptions of the functions watershed councils are expected to perform. Thus, it is difficult to make a definite call concerning this factor. Those general descriptions would encompass a wide range of activities, some of which are traditionally performed by government and others which are commonly performed by private entities.
- (3) The scope of the authority granted to and exercised by the entity — does it have authority to make binding decisions for the government? State statute does not grant any authority to watershed councils. Therefore, watershed councils have no authority to make binding decisions on behalf of state government entities. It is theoretically possible that a local government

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**group could give a watershed council some authority when it "designates" the council.**

**(4) The nature and level of governmental financial and non-financial support. This may vary, but can include GWEB grants. However, watershed councils may also receive funding from various non-governmental sources.**

**(5) The scope of governmental control over the entity. Statute does not authorize governmental control over watershed councils. Theoretically, a local government group could impose some kind of governmental control over a council as part of its "designation" of the council, but this is not likely. It is more likely that a watershed council will operate as a collaborative partnership of state, local and federal governments and various non-governmental entities, subject to no entity's "control."**

**(6) The status of the entity's officers and employees — are they public employees? This will depend upon the setup of each particular watershed council. Generally, statute imposes no requirements concerning watershed council officers and employees. Presumably, watershed council officers will come from a variety of governmental and nongovernmental entities. Because of the collaborative nature of watershed councils, they may not have "employees" per se.**

Accordingly, I conclude that it is unlikely that a watershed council would be legally required to comply with the Oregon Public Meetings Law. However, a watershed council may *voluntarily choose* to impose upon itself open meetings requirements similar to those under the Public Meetings Law. Of course, even if a council were to impose such requirements voluntarily, the Public Meetings Law (and its legal remedies for noncompliance) still would not apply unless the factors described above were satisfied.

I trust that this satisfies your concerns. Should you have additional questions, please do not hesitate to contact me.

Sincerely,



William R. Cook  
Assistant Attorney General  
Natural Resources Section